A

LUCY WONG NYUK KING & ANOR

v.

HWANG MEE HIONG

B

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
BALIA YUSOF WAHI JCA
TENGKU MAIMUN JCA
[CIVIL APPEAL NO: Q-02-1398-06-2012]

C

21 APRIL 2014

CONTRACT: *Termination - Validity - Sale and purchase agreement - Whether vacant possession delivered - Whether vendor relinquished rights on property upon signing agreement - Whether deeming provision*

D *applicable - Whether agreement validly terminated*

The respondent ('plaintiff') entered into a sale and purchase agreement ('SPA') of a shophouse with the appellants ('defendants') and paid a deposit of RM55,000 leaving a balance of RM265,000. At the material time, the plaintiff's husband

E ('PW2') was renting the said shophouse from the defendants. It was an undisputed fact that after the SPA was signed, the defendants had not terminated the tenancy agreement with PW2 and the tenancy continued until the occurrence of a fire resulting

F in the shophouse being unfit for occupation. The defendants received compensation for the damages caused by the fire from the insurance company. Subsequently, the plaintiff served a notice of termination under cl. 15 of the SPA to the defendants and requested for the return of the deposit. In reply, the defendants

G asked the plaintiff to pay the balance of the purchase price within 30 days and thereafter again wrote to the plaintiff saying 'that the agreement has been mutually terminated and annulled forthwith'. The plaintiff claimed that she was ever willing and ready to perform all her contractual obligations under the SPA if the

H defendants were willing to make good the loss and damage to the shophouse and hence, the suit against the defendants. The Judicial Commissioner ('JC') allowed the plaintiff's claims upon finding that the plaintiff had lawfully terminated the agreement and dismissed the defendants' counterclaim. Hence, the defendants' appeal

I against dismissal of the counterclaim. It was the defendants' contention that by virtue of the provision in cl. 5 of the SPA, vacant possession had been given to the plaintiff and upon the

failure of the plaintiff to pay the balance purchase price they were entitled to rely on cl. 11 of the SPA to treat the contract to be mutually terminated. On the other hand, the plaintiff contended that she was entitled to terminate the contract under cl. 15 of the SPA.

Held (dismissing appeal with costs)
Per Balia Yusof Wahi JCA delivering the judgment of the court:

(1) The JC found that the defendants had failed to deliver vacant possession of the shophouse to the plaintiff after the SPA was signed up to the date of the occurrence of the fire. The JC, having considered the evidence as regards to the continuation of the tenancy after the signing of the SPA, concluded that the defendants had not relinquished their rights over the shophouse. The continued occupation of the shophouse by PW2 under the terms of the subsisting tenancy agreement with the defendants could not be taken to mean that PW2 was occupying it on behalf of the plaintiff. PW2's occupation of the shophouse was independent of the plaintiff's right under the SPA. (paras 18-20)

(2) Only a transfer or an assignment of the tenancy agreement to the plaintiff, concurrent with the signing of the SPA, would trigger the application of the deeming provision of cl. 5 and have the effect of delivering vacant possession. The deeming provision of cl. 5 of the SPA was, like any other presumption, rebuttable. Thus, there was no error on the part of the JC in his appraisal and evaluation of the evidence that the plaintiff had rebutted the deeming provision in cl. 5 of the SPA that vacant possession was delivered to her upon the signing of the SPA. (paras 19, 21 & 22)

(3) It is not strange to have a deeming provision in a contract. It is the bounden duty of the court to interpret the contract and give effect to the intention of the contracting parties. While it was submitted as the expressed intention of the parties to have the vacant possession of the shophouse be deemed transferred on the signing of the SPA, the evidence clearly pointed in the opposite direction. (para 24)

(4) On the totality of the evidence and the factual matrix of the case, vacant possession of the said shophouse had never been given to the plaintiff and as such her reliance on cl. 15 of the

SPA to terminate the agreement was justified. The JC had rightly concluded that the plaintiff's termination relying on cl. 15 was in accordance with the SPA and she was not in breach of the same. The defendants had wrongfully terminated the SPA and their counterclaim was rightly dismissed. (para 25)

Bahasa Malaysia *Translation Of Headnotes*

Responden ('plaintif') memasuki satu perjanjian jual beli ('PJB') bagi sebuah rumah kedai dengan perayu-perayu ('defendan-defendan') dan telah membayar deposit sebanyak RM55,000 meninggalkan baki sebanyak RM265,000. Pada masa material, suami plaintif ('PW2') menyewa rumah kedai tersebut daripada defendan-defendan. Adalah fakta yang tidak dipertikaikan bahawa selepas PJB ditandatangani, defendan-defendan tidak menamatkan perjanjian penyewaan dengan PW2 dan penyewaan tersebut berterusan sehingga berlakunya kebakaran mengakibatkan rumah kedai tersebut tidak sesuai untuk diduduki. Defendan-defendan menerima pampasan bagi kerugian akibat kebakaran tersebut daripada syarikat insurans. Kemudian, plaintif menyerahkan notis penamatan di bawah kl. 15 PJB kepada defendan-defendan dan meminta pemulangan deposit. Sebagai jawapan, defendan-defendan meminta plaintif membayar baki harga belian dalam tempoh 30 hari dan kemudian menulis semula kepada plaintif menyatakan 'bahawa perjanjian tersebut telah ditamatkan secara bersama dan dibatalkan serta merta'. Plaintif menyatakan bahawa dia sentiasa berupaya dan bersedia untuk melaksanakan kesemua kewajipan kontraknya di bawah PJB tersebut jika defendan-defendan bersedia untuk membaiki kerosakan dan kerugian pada rumah kedai tersebut, dan dengan itu, guaman terhadap defendan-defendan. Pesuruhjaya Kehakiman ('PK') membenarkan tuntutan plaintif setelah mendapati bahawa plaintif telah menamatkan perjanjian secara sah dan menolak tuntutan balas defendan-defendan. Dengan itu, rayuan defendan-defendan terhadap penolakan tuntutan balas. Defendan-defendan menghujahkan bahawa berikutan peruntukan dalam kl. 5 PJB, milikan kosong telah diberikan kepada plaintif dan atas kegagalan plaintif membayar baki harga belian, mereka berhak menyandar atas kl. 11 PJB untuk menganggap kontrak tersebut ditamatkan secara bersama. Sebaliknya, plaintif menghujahkan bahawa dia berhak untuk menamatkan kontrak tersebut di bawah kl. 15 PJB.

Diputuskan (menolak rayuan dengan kos)
Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:

(1) PK mendapati bahawa defendan-defendan telah gagal untuk menyerahkan milikan kosong rumah kedai kepada plaintif selepas PJB ditandatangani sehingga tarikh kejadian kebakaran tersebut. PK, setelah mempertimbangkan keterangan berkaitan dengan penerusan penyewaan selepas pemeteraian PJB, memutuskan bahawa defendan-defendan tidak melepaskan hak-hak mereka terhadap rumah kedai tersebut. Penerusan PW2 menduduki rumah kedai tersebut di bawah terma-terma perjanjian penyewaan sedia ada dengan defendan-defendan tidak boleh dianggap sebagai bermaksud bahawa PW2 menduduki rumah kedai tersebut bagi pihak plaintif. PW2 menduduki rumah kedai tersebut bebas daripada hak plaintif di bawah PJB.

(2) Hanya suatu pindah milik atau penyerahakan perjanjian penyewaan kepada plaintif, sejajar dengan pemeteraian PJB, akan mencetuskan pemakaian peruntukan anggapan kl. 5 dan mempunyai kesan penyerahan milikan kosong. Peruntukan anggapan kl. 5 PJB adalah, seperti mana-mana anggapan lain, boleh dipatahkan. Oleh itu, tiada kekhilafan pada pihak PK dalam penilaian dan penelitiannya terhadap keterangan bahawa plaintif telah mematahkan peruntukan anggapan dalam kl. 5 PJB bahawa milikan kosong telah diserahkan kepadanya selepas pemeteraian PJB.

(3) Bukanlah sesuatu yang ganjil untuk memasukkan peruntukan anggapan dalam sesuatu kontrak. Adalah tanggungjawab mahkamah untuk mentafsir kontrak dan memberikan kesan kepada niat pihak-pihak yang berkontrak. Walaupun dihujahkan sebagai niat langsung pihak-pihak untuk menganggap milikan kosong dipindah milik selepas pemeteraian PJB, keterangan jelas menunjukkan yang sebaliknya.

(4) Atas keseluruhan keterangan dan maktriks fakta kes, milikan kosong rumah kedai tersebut tidak pernah diberikan kepada plaintif dan oleh itu, penyandarannya atas kl. 15 PJB untuk menamatkan perjanjian tersebut adalah dijustifikasikan. PK telah dengan betul memutuskan bahawa penamatan oleh

A plaintif dengan menyandar atas kl. 15 adalah menurut PJB dan dia tidak melanggar perjanjian tersebut. Defendan-defendan telah, secara salah, menamatkan PJB dan tuntutan balas mereka ditolak dengan betul.

B **Case(s) referred to:**

Azman Mahmood & Anor v. SJ Securities Sdn Bhd [2012] 6 CLJ 573 CA ***(refd)***

Choo Chin Thye v. Concrete Engineering Products Bhd & Other Appeals [2005] 2 CLJ 323 CA ***(refd)***

C *For the appellants - Tai Choi Yu; M/s Tai Choi Yu & Co*
For the respondent - Henry Ling Kwong Meng; M/s Ling & Wong

[Editor's note: For the High Court judgment, please see Hwang Mee Hiong v. Lucy Wong Nyuk King & Anor [2012] 1 LNS 319.]

D *Reported by S Barathi*

JUDGMENT

E **Balia Yusof Wahi JCA:**

[1] The respondent who was the plaintiff in the court below filed a suit against the appellants as defendants for specific performance or damages for breach of contract under an
F agreement dated 23 September 2008 for the sale and purchase of a shophouse belonging to the defendants. We will refer to the parties as what they have been referred to in the High Court below.

G **[2]** In Suit No. 22-09-2010 (BTU) at the Bintulu High Court, the plaintiff filed a claim against the defendants for the following reliefs:

(a) Specific performance of the contract;

H (b) Alternatively, damages *in lieu* of specific performance for breach of contract with assessment of damages on the consequential loss and damage;

(c) Interest at the rate of 8% per annum on such damages from the date of the writ till date of full settlement or at such rate
I and for such period the court shall deem fit;

(d) Costs;

(e) Further or other relief.

[3] The defendants filed a counterclaim and sought the following reliefs:

(a) General damages for breach of contract;

(b) Payment of RM315,000 for the loss and damages sustained by the defendants and still running;

(c) Loss and damages by the plantiff lodging the private caveat on Lot 437 Block 22 Buan Land District to be assessed;

(d) Such other reliefs as the court deems fit; and

(e) Costs.

[4] The facts leading to the plaintiffs claim against the defendants may be summarised as follows:

> Upon the signing of the sale and purchase agreement (SPA), the plaintiff paid a deposit of RM55,000 leaving a balance of RM265,000 of the RM320.000 purchase price of the said shophouse. At the material time, the plaintiff's husband was renting the said shophouse from the defendants at a monthly rental of RM1,100 and the said tenancy was to expire on 31 December 2012.

[5] It is also an undisputed fact that after the SPA was signed, the defendants have not terminated the tenancy agreement with the plaintiff's husband and the tenancy continued until the occurrence of a fire on 5 November 2008 and the shophouse became unfit for occupation. Resulting from the fire, the defendants had received RM85,000 from the insurance company as compensation for the damage caused by the fire.

[6] On 13 November 2008, the plaintiff's solicitors served a notice of termination under cl. 15 of the SPA to the defendants and requested for the return of the RM55,000 deposit.

[7] On 19 January 2009 the defendants' solicitors in reply, wrote to the plaintiff asking the plaintiff to pay within 30 days the balance of the purchase price and on 20 March 2009 the defendants' solicitors again wrote to the plaintiff's solicitors saying "that the agreement has been mutually terminated and annulled forthwith". The plaintiff claims that she is ever willing and ready

to perform all her contractual obligations under the SPA if the defendants are willing to make good the loss and damage to the shophouse. Hence, the suit against the defendants.

[8] At the conclusion of the trial, the learned Judicial Commissioner (JC) allowed the plaintiff's claims and awarded her general damages in the sum of RM85,000 with interest at 4% per annum from 29 April 2010 until date of realisation and costs to be taxed unless agreed. The learned JC also ordered the plaintiff to withdraw a caveat on the said property within 14 days of the receipt of the judgment sum. As for the defendants' counterclaim, it was dismissed with costs.

[9] Against this decision of the learned JC, the defendants has filed two appeals to this court *vide* Civil Appeal No. Q-02-2618-2010 and Civil Appeal No. Q-02-1398-06-2012. The two appeals were heard together on 12 April 2013 at the end of which we allowed the appeal in Civil Appeal No. Q-02-2618-2010 and the Civil Appeal No. Q-02-1398-06-2012 was dismissed.

[10] The defendants have since obtained leave to appeal to the Federal Court against our decision in respect of Appeal No. Q-02-1398-06-2012. We now give our decision in respect of the said appeal.

[11] The defendants' appeal against the decision of the JC is on the dismissal of their counterclaim against the plaintiff. In the judgment, the learned Judicial Commissioner had found that the plaintiff had lawfully terminated the agreement *vide* her solicitor's letter dated 13 November 2008. In the said letter, the plaintiff's solicitors had relied on cl. 15 of the SPA which reads:

> 15. Property Damaged By Fire, Etc
>
> In the event before the delivery of the vacant possession of the said Property by the Vendor(s) to the Purchaser(s), the said Property or any part thereof shall be destroyed or damaged by fire and/or any other cause(s), it is hereby expressly agreed that the parties hereto shall be entitled unilaterally to rescind this Agreement by written notice whereupon the Vendor(s) shall on demand forthwith refund to the Purchaser(s) the deposit and all whatsoever monies paid herein, free of interest, in any event not exceeding fourteen (14) days upon receipt of written notification thereof, and upon such payment this Agreement shall become null and void and neither party shall have any claim against the other.

[12] It is the contention of the defendants that by virtue of the provision in cl. 5 of the SPA, vacant possession has been given to the plaintiff and upon the failure of the plaintiff to pay the balance purchase price, they are entitled to rely on cl. 11 of the same to treat the contract to be mutually terminated. The plaintiff on the other hand contends that she is entitled to terminate the contract under cl. 15 of the same.

[13] In giving judgment in favour of the plaintiff, the learned JC found that on the occurrence of the fire, the plaintiff not having been handed over vacant possession of the shophouse by the defendants was perfectly within her rights to terminate the agreement in reliance of the above said clause. Thus, the plaintiff's termination is not in breach of the SPA.

[14] The learned JC found that the defendants, instead of accepting the lawful termination by the plaintiff, had wrongly served a notice under cl. 11 of the SPA to terminate the agreement with intention to forfeit the deposit sum of RM55,000.

[15] At p. 38 of the appeal record volume 1 the learned JC concluded by saying:

> The Court finds that the Defendants instead of accepting the Plaintiff's lawful notice to terminate because of the fire had wrongfully served notices under Clause 11 of the Agreement to terminate the Agreement with intention to forfeit the shophouse deposit. There is no basis to support the Defendants' termination of the Agreement relying on Clause 11 and therefore the counterclaim for the Plaintiff's wrongful termination relying as clause 15 is misfounded. The Defendants by their wrongful termination under Clause 11 has breached the Agreement.

[16] For ease of reference, cl. 11 of the SPA is reproduced below and it reads:

> 11. Purchaser(s)' Breach
>
> In the event that the Purchaser(s) shall fail or refuse or be unwilling to complete the purchase in accordance with the terms and conditions herein contained, the Vendor(s) shall be at liberty to terminate this Agreement, without prejudice to their right to sue for specific performance of this Agreement, by giving to the Purchaser(s) not less than THIRTY (30) days in writing and (unless in the meanwhile the Purchaser(s) shall be ready able and willing to pay the full balance outstanding and remedy their breach

of this Agreement, if any) upon expiry of the said notice this Agreement shall be deemed to have been mutually terminated and annulled forthwith and in such event:

(a) All sum or sums of which have been paid by the Purchaser(s) under this Agreement shall be forfeited by the Vendors(s);

(b) Neither party shall have any further claim against the party;

(c) Any caveat lodged by the Purchaser(s) or on their behalf against the said Property shall be forthwith withdrawn by the Purchasers at their own cost;

(d) The Vendor(s) shall be at liberty to sell the said Property to any other party as they deem fit;

(e) The Purchaser(s) shall require to re-deliver vacant possession of the said Property with it original condition to the Vendor(s) without any claims whatsoever, if the same shall have been delivered.

[17] In resolving the dispute between the parties in respect of the defendants' counterclaim, the learned JC had considered two crucial issues, namely, whether the defendants had delivered vacant possession of the shophouse and the effect of the termination of the SPA under cl. 15.

[18] On the issue of vacant possession, the learned JC had found that the defendants had failed to deliver vacant possession of the shophouse to the plaintiff after the SPA was signed up to the date of the occurrence of the fire. This is beside the fact that there is a deeming provision in the SPA in cl. 5 which states:

> The vacant possession of the said property shall be deemed to be delivered by the Vendor(s) to the Purchaser(s) upon signing of this agreement.

[19] In arriving at the said finding, the learned JC, having considered in particular the evidence of PW2 as regards to the continuation of the tenancy after the signing of the SPA concludes that the defendants had not relinquished their rights over the shophouse. By maintaining their rights under the tenancy agreement as the landlord, the defendants remain in possession of the shophouse. This evidence of the defendants having continued

to maintain possession of the shophouse through the tenancy agreement and not delivering vacant possession of the same had rebutted the deeming provision in cl. 5 of the SPA.

[20] The continued occupation of the shophouse by PW2 (the plaintiff's husband) under the terms of the subsisting tenancy agreement with the defendants cannot be taken to mean that PW2 was occupying it on behalf of the plaintiff. PW2's occupation of the said shophouse is independent of the plaintiffs' right under the SPA.

[21] We are in agreement with the finding of the learned JC that only a transfer or an assignment of the tenancy agreement to the plaintiff concurrent with the signing of the SPA will trigger the application of the deeming provision of cl. 5 and have the effect of delivering vacant possession. This is easily achieved through the literal interpretation of the said clause and giving its own natural meaning.

[22] We are of the view that the deeming provision of cl. 5 of the SPA is, like any other presumption, rebuttable. The learned JC had found as a fact that the plaintiff had through the evidence of PW2 rebutted that vacant possession was delivered to her upon the signing of the SPA.

[23] It is trite law that an appellate court would very rarely interfere with primary finding of facts made by the trial court. (*Choo Chin Thye v. Concrete Engineering Products Bhd & Other Appeals* [2005] 2 CLJ 323, *Azman Mahmood & Anor v. SJ Securities Sdn Bhd* [2012] 6 CLJ 573). We do not find any error on the part of the learned JC in his appraisal and evaluation of the evidence. We loath to interfere.

[24] It is not strange to have a deeming provision in a contract. It is the bounden duty of the court to interpret the contract and give effect to the intention of the contracting parties. While it was submitted as the expressed intention of the parties to have the vacant possession of the shophouse be deemed transferred on the signing of the SPA, the evidence clearly pointed in the opposite direction.

[25] On the totality of the evidence and the factual matrix of the case, we found vacant possession of the said shophouse has never been given to the plaintiff and as such her reliance on cl. 15 of the SPA to terminate the agreement was justified. The learned JC had rightly concluded that the plaintiff's termination relying on cl. 15 was in accordance with the SPA and she was not in breach of the same. The defendants had wrongfully terminated the SPA and their counterclaim was rightly dismissed.

[26] We found no merit in the appeal and the appeal is dismissed with costs of RM40,000 here and below. Deposit to be refunded.